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No. 94-1790 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1994

WELLINGTON TRADE INCORPORATED, D/B/A CONTAINERHOUSE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, under the terms of the contract between petitioner and the United States, the government had the right to reinspect merchandise after delivery to determine if it conformed to the specifications of the contract.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-25) is unpublished, but the decision is noted at 36 F.3d 93 (Table). The oral findings and conclusions of the district court (Pet. App. 26-39) and the written order of that court (Pet. App. 40-45) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 1994. A petition for rehearing was denied on February 1, 1995. Pet. App. 46-47. The petition for

a writ of certiorari was filed on May 1, 1995. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On January 30, 1991, petitioner was awarded a contract to provide 134 cargo containers to transport ammunition to the Persian Gulf during Operation Desert Storm. Pet. App. 2, 5-6. The contract provided for the containers to "be inspected at the city of origin [Jacksonville, Florida], with final acceptance at the destination [Anniston Army Depot, Anniston, Alabama]." *Id.* at 6. On February 7 and 8, 1991, a quality assurance inspection was performed in Jacksonville by a government inspector, who then certified that the containers met contract specifications. *Id.* at 7. Upon the containers' arrival at the Army Depot, quality assurance personnel thoroughly inspected them. After three days of inspections, they concluded that none of the containers met contract specifications. *Id.* at 8. Accordingly, the contracting officer did not accept the containers, refused to make payment, and requested that petitioner remove the containers. *Ibid.*[1]

2. Petitioner refused to remove the containers and, after exhausting its administrative remedy, brought a breach of contract action against the United States in the United States Claims Court under the Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.* Pet. App. 8.

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[1] Although petitioner obtained signatures on Department of Defense forms indicating that the containers had been "accepted" by the government, the courts below both found that the people who signed those forms were not authorized to do so and that the government was not bound by these signatures. Pet. App. 16-17, 31. Petitioner does not currently challenge those findings.

On respondent's motion, the action was transferred to the District Court for the Middle District of Florida because it involved a maritime contract. 41 U.S.C. 603; Pet. App. 8.

After a six-day bench trial, the district court found that under the terms of the contract respondent had the right to reinspect the containers prior to acceptance and that the containers were in fact defective and therefore respondent had not breached the contract. Pet. App. 28-30, 34-35.

The district court resolved two other claims in petitioner's favor. The court accepted petitioner's alternative claim that, because petitioner had "reasonably relied" upon the results of the initial inspection and other "circumstances" surrounding the transaction, petitioner was entitled to damages (although not the full contract price). Pet. App. 35-38, 41-42. The court also dismissed with prejudice the government's counterclaim for the cost of moving and storing the defective containers. *Id.* at 44.

3. The court of appeals affirmed in part, reversed in part, and remanded for further proceedings. Pet. App. 1-25. The court rejected petitioner's claim that the government committed a breach of contract by rejecting the containers after the first inspection but prior to acceptance. The court found "no ambiguity [in the contract] regarding the Government's right to inspect the containers at Anniston prior to acceptance." *Id.* at 11. The court held that several provisions of the Federal Acquisition Regulations (FAR), explicitly incorporated by reference into the contract, "unequivocally reserved to the Government the right to conduct a second quality assurance inspection at

Anniston prior to acceptance." *Ibid.*[2] Specifically, the court of appeals relied on FAR § 52.246-2(c), which provides that "[t]he Government has the right to inspect and test all supplies called for by the contract, to the extent practicable, at all places and times, including the period of manufacture, and in any event before acceptance," and FAR § 52.246-2(k), which provides that "[i]nspections and tests by the Government do not relieve the Contractor of responsibility for defects or other failures to meet contract requirements before acceptance."

The court concluded that "these clauses envision the Government retaining the right to reject nonconforming containers until the moment of formal acceptance." Pet. App. 12. Accordingly, the court rejected petitioner's argument that the term "final acceptance" in the contract should "be interpreted as permitting only an inspection for in-transit damage at destination." *Id.* at 13. The court stated that "[s]uch an interpretation * * * contradicts the plain meaning of the FAR clauses discussed above and would render them inconsequential." *Ibid.* The court added that "[s]ince there is no ambiguity on the face of the contract, the district court properly excluded extrinsic evidence on this issue." *Ibid.*

The court of appeals also rejected petitioner's argument that the district court's interpretation of the term "final acceptance" conflicts with certain other FAR provisions dealing with inspection and acceptance that were not expressly incorporated into the contract. Pet. App. 14-15. Petitioner, relying upon *G.L. Christian & Assocs.* v. *United States*, 312 F.2d 418

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[2] FAR is contained in Volume 48 of the Code of Federal Regulations.

(Ct. Cl.), cert. denied, 375 U.S. 954 (1963), and *S.J. Amoroso Constr. Co.* v. *United States*, 26 Cl. Ct. 759 (1992), aff'd, 12 F.3d 1072 (Fed. Cir. 1993), maintained that these regulations nonetheless were applicable to the contract, and that they precluded the government from conducting a quality assurance inspection at the destination. The court distinguished *G.L. Christian* and *Amoroso*, however, on the ground that in both of those cases, "the regulations expressly required the contracts at issue [to] contain particular standardized clauses." Pet. App. 16.

The court held in the alternative that "it does not appear the Government violated FAR 46.401(d) when it inspected the containers at Anniston," because that provision only states that supplies should not "ordinarily" be reinspected for contract conformity at destination, and "[t]he record indicates * * * [that] this [may] not have been the 'ordinary' case." Pet. App. 15 n.9. The court reasoned that "[g]iven the rushed procurement and the fact that these were used containers purchased to carry explosive ammunition, it is reasonable to assume a second quality inspection by inspectors familiar with ammunition containers was called for." *Ibid.*

The court reversed the district court's decisions to award petitioner some damages and to dismiss the government's counterclaim for costs associated with moving and storing the containers because the government neither breached the contract nor prevented petitioner from performing under it. Pet. App. 18-25. The court remanded for the district court to resolve the government's counterclaim. *Id.* at 25.

ARGUMENT

Petitioner claims (Pet. 7-19) that the court of appeals failed to give the FAR their proper weight. The FAR are a comprehensive series of regulations that govern the government's procurement of goods and services. There are three distinct types of FAR provisions. First, some provisions mandate the inclusion of specific contractual clauses in government contracts. See, *e.g.*, FAR § 46.302 ("The contracting officer shall insert the clause at [FAR] 52.246-2, Inspection of Supplies—Fixed-Price, in solicitations and contracts for supplies * * * when a fixed-priced contract is contemplated and the contract amount is expected to exceed the small purchase limitation."). Other FAR provisions are merely precatory, recommending to agencies one course of conduct over another. See, *e.g.*, FAR § 46.000 (Part 46 merely prescribes general "policies and procedures to ensure that supplies and services acquired under Government contract conform to the contract's quality and quantity requirements."). Finally, there are FAR provisions that are definitional in nature; they serve to assist the agencies and contracting officers in determining which FAR provisions apply in which circumstances. See, *e.g.*, §§ FAR 46.101, 46.203.

The "*Christian* doctrine" (originating with *G.L. Christian & Assocs.* v. *United States*, 312 F.2d 418 (Ct. Cl.), cert. denied, 375 U.S. 954 (1963)) on which petitioner relies (Pet. 13-17) does not provide that all FAR provisions are incorporated into every government contract. Instead, as the Eleventh Circuit observed in this case, the *Christian* doctrine imports indivivual FAR provisions into government contracts only when "the regulations expressly require[] the

contracts at issue [to] contain particular standardized clauses." Pet. App. 16; see, *e.g.*, *S.J. Amoroso Constr. Co.* v. *United States*, 12 F.3d 1072, 1075 (Fed. Cir. 1993) ("a mandatory contract clause that expresses a significant or deeply ingrained strand of public procurement policy is considered to be included in a contract by operation of law"); *General Eng'g & Machine Works* v. *O'Keefe*, 991 F.2d 775, 779 (Fed. Cir. 1993) ("under the *Christian* Doctrine a court may insert a clause into a government contract by operation of law if that clause is required under applicable federal administrative regulations"); *United States* v. *Bills*, 822 F.2d 373, 377 (3d Cir. 1987) ("Where valid regulations apply and require inclusion of a specific clause in public contracts it will be incorporated even if omitted from the writing or not approved by the parties."); *United States* v. *New Orleans Public Serv., Inc.*, 553 F.2d 459, 469 (5th Cir. 1977) ("where regulations apply and require the inclusion of a contract clause in every contract, the clause is incorporated into the contract, even if it has not been expressly included in a written contract"), vacated, 436 U.S. 942 (1978); *Condec Corp.* v. *United States*, 369 F.2d 753, 757 (Ct. Cl. 1966). Neither provision relied upon by the petitioner is the type of required contract clause contemplated by the *Christian* doctrine.

Petitioner relies (Pet. 9-11) upon FAR § 46.401(d), which states that "[i]f a contract provides for delivery and acceptance at destination and the Government inspects the supplies at a place other than destination, the supplies shall not *ordinarily* be reinspected at destination, but should be examined for quantity, damage in transit, and possible substitution or fraud." Pet. 9-10 (emphasis added). FAR § 46.401(d) was not

part of the contract with petitioner nor is it the type of provision that requires the inclusion of a particular contract clause. Instead, it is a general policy statement that is intended to guide the government during negotiations over the terms of an ordinary procurement contract.

Nor is it evident that this policy statement was violated in this contract. As the court of appeals noted, "it does not appear the Government contravened section 46.401(d) when it inspected the containers at Anniston," because that provision only states that supplies should not "ordinarily" be reinspected for contract conformity at destination, and "[t]he record indicates * * * [that] this [may] not have been the 'ordinary' case." Pet. App. 15 n.9. As the court held, "[g]iven the rushed procurement and the fact that these were used containers purchased to carry explosive ammunition, it is reasonable to assume a second quality inspection by inspectors familiar with ammunition containers was called for." *Ibid.*; *id.* at 37 (noting that the contract was formed "in the heat of trying to supply goods which were thought * * * to be needed for the support of the military effort in DESERT STORM").

Petitioner also invokes (Pet. 7-9) the definitions of "inspection" and "acceptance" in FAR § 46.101, and argues that these provisions demonstrate the incorrectness of the court of appeals' interpretation of the contract.[3] However, these definitions were not

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[3] FAR § 46.101 provides in pertinent part:

> *Acceptance*, as used in this part, means the act of an authorized representative of the Government by which the Government, for itself or as agent of another, assumes ownership of existing identified supplies tendered or

explicitly incorporated into the contract, nor were they ever intended to be used in that manner. Instead, for example, contracting officers are expected to refer to the definition of "acceptance" in FAR § 46.101 in interpreting FAR § 46.502's provision that "[a]cceptance of supplies or services is the responsibility of the contracting officer." Thus the definitions in FAR 46.101 were intended to be utilized in determining which substantive obligations of FAR Part 46 were applicable, not the meaning of "final acceptance" in any particular procurement contract.[4]

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approves specific services rendered as partial or complete performance of the contract.

* * *

Inspection, means examining and testing supplies or services (including, when appropriate, raw materials, components, and intermediate assemblies) to determine whether they conform to contract requirements.

[4] Assuming *arguendo* that the cases cited by petitioner (Pet. 14-17) supported the proposition that the contract incorporated FAR Sections 46.101, petitioner's effort (Pet. 9-11) to establish a hard-and-fast distinction under the regulations between "inspection" and "acceptance" is unavailing. As the Court of Claims stated, "accommodation of the Government's right to accept or to reject supplies at destination necessarily implies that the Government should also have the right to reinspect those supplies at that time." *A.B.G. Instrument & Eng'g, Inc.* v. *United States*, 593 F.2d 394, 400 (Ct. Cl. 1979); see also FAR § 46.501 ("[a]cceptance constitutes acknowledgment that the supplies or services conform with applicable contract quality and quantity requirements, except as provided in this subpart and subject to other terms and conditions of the contract").

A.B.G. is strikingly similar to the instant case. In *A.B.G.*, the court upheld the government's right to reinspect supplies at destination even if the supplies had passed the government's inspection at the contractor's facility. The contract in *A.B.G.*,

Instead, the court of appeals correctly determined that FAR § 52.246-2(c) ("[t]he Government has the right to inspect and test all supplies called for by the contract, to the extent practicable, at all places and times, * * * and in any event before acceptance"), which was explicitly incorporated into the contract, along with other portions of the contract, permitted the government to perform a thorough inspection at the destination point prior to acceptance. Pet. App. 12-13.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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like the contract in the case at bar, provided for inspection at origin and acceptance at destination. 593 F.2d at 399. The court held that "[g]iven these two provisions—shipment at the seller's risk and acceptance at point of destination—it is obvious that the Government did not contractually bind itself to a situation whereby its origin inspections would preempt its right to reject nonconforming goods upon their later tender." *Id.* at 400.